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IN THE
COURT OF APPEALS OF INDIANA

GERALD L. WHALEN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 89A01-0511-CV-515
	)	
EDDIE ROHE and PATRICIA ROHE,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable David A. Kolger, Judge
Cause No. 89C01-0504-PL-010

October 16, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

In this interlocutory appeal, Dr. Gerald L. Whalen appeals the trial court's denial of his request for a preliminary injunction against Eddie and Patricia Rohe ("the Rohes").

Whalen raises four issues, which we consolidate and restate as whether the trial court erred by denying Whalen's request for a preliminary injunction. We affirm.[1]

The relevant facts follow. Whalen purchased a chiropractic office located at 2 South 34th Street in Richmond, Indiana, in March 1982. During Whalen's ownership of the property, water has flowed off of U.S. 40, down South 34th Street, and across Whalen's asphalt parking lot toward the southwest corner of his property. The water would then flow under a fence onto the adjacent property owned by the Rohes located at 18 South 34th Street. The Rohes purchased the property in approximately 2000. In November 2002 and April 2003, Whalen's basement flooded. In the summer of 2004, the Rohes placed stones to block the flow of water under their fence and then placed a wooden barrier to block the flow of water. Whalen's property then flooded in November 2004 and five times in 2005.

Whalen filed a complaint against the Rohes for removal of an obstruction to a natural watercourse, for an injunction, for the establishment of a prescriptive easement, and for damages. Whalen also filed a verified petition for a preliminary injunction requiring the Rohes to remove an obstruction from a natural surface watercourse. After a hearing at which only Whalen and Patricia Rohe testified, the trial court entered the following findings of fact and conclusions thereon:

FINDINGS OF FACT

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[1] We direct Whalen's attention to Ind. Appellate Rule 46(A)(10), which requires an appellant's brief to "include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal."

1) This Court has jurisdiction over the parties and the subject matter of this cause of action.
2) That [Whalen] is the owner of real property located at 2 South 34th Street in Richmond, Wayne County, Indiana and that [Whalen] has owned and occupied the real property since 1982.
3) That [the Rohes] are the owners of real property located at 18 South 34th Street, Richmond, Wayne County, Indiana, and that [the Rohes] have owned and occupied that real property for approximately 5 years.
4) That at the time [the Rohes] purchased the property at 18 South 34th Street, the backyard of that property was enclosed by a wooden privacy fence, which abuts the southern boundary of [Whalen's] property.
5) That during periods of heavy rainfall, both before and after [the Rohes] owned and occupied their property at 18 South 34th Street, rainwater would run southbound across [Whalen's] asphalt parking lot into an unfinished low point located on the southwest corner of [Whalen's] parking lot.
6) That after accumulating in the low point on the southwest corner of [Whalen's] asphalt parking lot, the water would flow beneath the wooden privacy fence along the northern boundary of [the Rohes'] property.
7) That the water would pool on [the Rohes'] property until it evaporated or was absorbed into [the Rohes'] property.
8) That sometime before [the Rohes] purchased and occupied their property at 18 South 34th Street, a drain had been installed in the backyard of the property within the area enclosed by the wooden privacy fence.
9) That the drain located on [the Rohes'] property was not established by the mutual consent of the parties or their predecessors in title.
10) That there is insufficient evidence that the drain was established under or made subject to any drainage statute.
11) Neither [Whalen] nor [the Rohes] had ever observed any water flow beneath the wooden fence and pool to such an extent that it flowed into the drain located in [the Rohes'] backyard.
12) That [the Rohes] impeded the flow of water under their wooden privacy fence by permitting existing vegetation to naturally propagate in the area where the water flowed beneath the wooden privacy fence.

13) That [the Rohes] impeded the flow of water under their wooden privacy fence by placing a wooden board in the area where the water flowed beneath their wooden privacy fence.
14) That [Whalen] has made alterations and modifications to the low point to enhance or increase the flow of water under the wooden privacy fence.
15) After [the Rohes] first placed the stone wall in the channel, [Whalen] began noticing increased amounts of water collecting in the unfinished low point located near the southwest corner of [Whalen's] property. The unfinished obstruction caused rainwater to pool on [Whalen's] property and had the effect of creating a dam within the unfinished low point. [Whalen] responded by deepening the unfinished low point on his property by digging it an inch deeper. However, after [the Rohes] installed the board to block the area beneath their wooden privacy fence rainwater could no longer pass under the fence. Therefore, water continued to collect in greater and greater amounts.
16) That neither [Whalen] nor [the Rohes] called as a witness any expert qualified to testify regarding hydraulics, water flow, drainage, surveying, or any other matter relating to this dispute.
17) That some of the water must flow over a distance of asphalt constituting city streets to reach the low point located at the southwest point of [Whalen's] property.
18) There is no place on [Whalen's] property where there are well-defined banks formed by natural terrain.
19) There is no place on [Whalen's] property that constitutes an identifiable and more or less permanent course, which includes among its features a bed where a natural stream of water runs.

CONCLUSIONS OF LAW

1) [Whalen's] remedies at law are adequate.
2) [Whalen] does not have a reasonable likelihood of success at trial.
3) The drain located on [the Rohes'] property is not a natural drain as defined at I.C. 36-9-27-2 and as applied at I.C. 36-9-27.4.
4) The wooden board, or alleged obstruction, is not an obstruction as defined at I.C. 36-9-27.4-4.
5) There is no natural surface watercourse located on [Whalen's] property, as that term is defined at I.C. 36-9-27.4-3.
6) The water complained of within [Whalen's] pleadings constitutes surface water.

7) "'In its most simplistic and pure form, the rule known as the common ene[m]y doctrine' declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealing includes walling it out, walling it in and diverting or accelerating its flow by any means whatever." Argyelan v. Ha[v]iland, 435 NE2d 973, 975 (Ind. 1982).

8) [Whalen's] request for issuance of a preliminary injunction should be denied.

JUDGMENT

IT IS THEREFORE ORDERED that [Whalen's] Request For A Preliminary Injunction is denied.

Appellant's Appendix at 5-7.

The issue is whether the trial court erred by denying Whalen's request for a preliminary injunction. The grant or denial of a request for a preliminary injunction rests within the sound discretion of the trial court, and our review is limited to whether there was a clear abuse of that discretion. Ind. Family and Soc. Servs. Admin. v. Walgreen Co., 769 N.E.2d 158, 161 (Ind. 2002). When determining whether to grant a preliminary injunction, the trial court is required to make special findings of fact and state its conclusions thereon. Barlow v. Sipes, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001) (citing Ind. Trial Rule 52(A)), trans. denied. When findings and conclusions thereon are made, we must determine if the trial court's findings support the judgment. Id. We will reverse the trial court's judgment only when it is clearly erroneous. Id. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. CSX Transp., Inc. v. Rabold, 691

N.E.2d 1275, 1277 (Ind. Ct. App. 1998), trans. denied. We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment. Barlow, 744 N.E.2d at 5. Moreover, "[t]he power to issue a preliminary injunction should be used sparingly, and such relief should not be granted except in rare instances in which the law and facts are clearly within the moving party's favor." Id.

To obtain a preliminary injunction, the moving party has the burden of showing by a preponderance of the evidence that:

> 1) [movant's] remedies at law were inadequate, thus causing irreparable harm pending resolution of the substantive action;
>
> 2) it had at least a reasonable likelihood of success at trial by establishing a prima facie case;
>
> 3) its threatened injury outweighed the potential harm to appellant resulting from the granting of an injunction; and
>
> 4) the public interest would not be disserved.

Walgreen, 769 N.E.2d at 161. The movant must prove each of these requirements to obtain the preliminary injunction. McGlothen v. Heritage Envtl. Servs., L.L.C., 705 N.E.2d 1069, 1074 (Ind. Ct. App. 1999).

The trial court here found that Whalen's remedies at law were adequate and that he did not have a reasonable likelihood of success at trial. To succeed in his appeal of the trial court's judgment, Whalen must show that the trial court's findings on both of these factors are clearly erroneous. However, in his appellant's brief, Whalen focuses upon the reasonable likelihood of success issue and makes no argument regarding the remedies at law issue. Whalen argues in his reply brief that the trial court erred when it found that his

remedies at law were adequate. However, because Whalen raised this issue for the first time in his reply brief, it is waived. See, e.g., Felsher v. University of Evansville, 755 N.E.2d 589, 593 n.6 (Ind. 2001) (holding that an argument was waived because it was raised for the first time in the reply brief); see also Ind. App. R. 46(C) ("No new issues shall be raised in the reply brief."). As a result of the waiver, Whalen has failed to demonstrate that the trial court's denial of his motion for a preliminary injunction is clearly erroneous.

For the foregoing reasons, we affirm the trial court's denial of Whalen's petition for a preliminary injunction.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur